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No. 88-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NANCY BETH CRUZAN, by her parents and co-guardians,
Petitioners,
v.
DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, *et al.*,
Respondents,
v.
THAD C. MCCANSE, Guardian ad Litem,
Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF FOCUS ON THE FAMILY AND FAMILY RESEARCH COUNCIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF FOCUS ON THE FAMILY AND FAMILY RESEARCH COUNCIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE* *

Amicus Curiae Focus on the Family is a Christian, non-profit organization which is committed to strengthening the emotional, psychological and spiritual health of families in the United States and throughout the world. *Amicus* believes that the inalienable rights of the unitary family and the inalienable right to life of every human being are both derived from the same moral order

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* This brief is filed with the written consent of the parties, copies of which have been filed with the Clerk of this Court.

and that neither right can long endure without the other. Its daily radio broadcasts, dealing with family concerns, trauma and health, are heard by more than one million persons. *Amicus* receives more than 10,000 letters and calls daily from individuals and family members, many of whom express the pain and triumph of dealing with death, prolonged illness and incompetence of loved ones.

Amicus Curiae Family Research Council, a division of Focus on the Family, is a voice for the pro-family movement in Washington, D.C., and provides policy analysis and research support for Focus on the Family. As such, it is acutely aware of the stresses that confront families that are dealing with life and death issues.

SUMMARY OF ARGUMENT

This appeal directly challenges the sanctity of human life and threatens to strip the states of their traditional authority to protect the lives of all human beings, regardless of age, health or condition of dependency. Since it origin, the common law has sought to protect all persons, especially the weak and infirm, through the law of homicide, suicide and guardianship. The law has never accepted the consent of the victim as a defense to homicide or benevolent motive as an excuse. The common law has also prohibited suicide, by any means and for any reason. Suicide was a felony at common law and a person's deliberate refusal of food and water in order to bring about his own death has always been regarded as suicide. And under the law of guardianship, the common law protected those persons who were not able to care for themselves.

Through experience the law has come to understand both the vulnerability of incompetent persons and the resulting stress upon their families. The common law expresses society's understanding that families must be particularly guided by the law of homicide, suicide and guardianship because of the intense emotional, financial

and physical burdens that weigh upon those who care for their relatives. Prolonged physical and mental illness and incapacity are familiar characteristics of family life and affect families in unique ways. Caregivers need the financial, emotional, psychological and spiritual support of their families, friends and community. The law is inadequate to provide this support fully But the law has always sought to protect vulnerable persons by prohibiting others from inflicting harm or death.

In this century, the common law began to recognize an explicit right of a competent adult to refuse medical treatment. This right is premised on the common law right to be free from unconsented physical touchings. It has never been understood to have abolished or amended the law of homicide and suicide.

The right to refuse medical treatment assumes a competent patient who has the cognitive capacity to make a decision about a particular treatment in his or her particular condition. In the case of incompetent patients, however, the decision whether to provide medical treatment has focused on the benefits and burdens of the particular treatment. Assisted feeding has been considered ordinary and not extraordinary care.

To transform the right to refuse medical treatment into a right to die, which may be effected by the withdrawal of life sustaining food and fluids, is to confound the lessons learned by the common law about family relations. This would denigrate the intrinsic value of each individual and thus undermine the strength of the family.

The constitutional right of privacy cannot sweep away the law's traditional and legitimate protection of defenseless persons by investing third parties with the authority to withdraw assisted feeding in order to induce their death. No such right is "deeply rooted in this Nation's history and tradition."

ARGUMENT

> This is . . . a case in which euphemisms readily find their way to the fore, perhaps to soften the reality of what is really at stake. But this is not a case in which we are asked to let someone die. Nancy is not dead. Nor is she terminally ill. This is a case in which we are asked to allow the medical profession to make Nancy die by starvation and dehydration. *The debate here is thus not between life and death; it is between quality of life and death.* We are asked to hold that the cost of maintaining Nancy's present life is too great when weighed against the benefit that life conveys both to Nancy and her loved ones and that she must die.

Cruzan v. Harmon, 760 S.W.2d 408, 412 (Mo. 1988) (emphasis added).

I. THE CONTOURS OF THE CONSTITUTIONAL RIGHT OF PRIVACY ARE DETERMINED BY HISTORY AND TRADITION.

The question raised by this appeal is whether an incompetent patient, who is not terminally ill or imminently dying, has a federal constitutional right to refuse assisted feeding in order to bring about her death and, if so, whether that right may be exercised, through substituted judgment, by her court-appointed guardians. Petitioners contend that such a right is encompassed within the constitutional right of privacy.

In mapping the boundaries of the right of privacy, this Court has consistently examined the historical basis for the claimed right. *Michael H. v. Gerald D.*, 109 S.Ct. 2333, 2341-43 (1989); *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986); *Moore v. City of East Cleveland*, 431 U.S. 494, 502-503 (1977) (plurality). Specifically, this Court has sought to determine whether the proposed right is "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed," or whether it is "deeply rooted in this Nation's history and

tradition." *Bowers*, 478 U.S. at 192. Examination of the history of the common law convincingly demonstrates that the right of privacy does not bestow upon court-appointed guardians the right to refuse assisted feeding on behalf of their incompetent ward who can no longer speak for herself. Such conduct directly undermines our society's traditional prohibition of homicide, suicide and euthanasia, and the obligations of guardians to act solely in the best interests of their wards. Accordingly, it cannot be said to be "deeply rooted in this Nation's history and tradition."

II. THE COMMON LAW TRADITIONALLY HAS PROHIBITED HOMICIDE, SUICIDE AND EUTHANASIA, AND HAS REGULATED THE RELATIONSHIP OF GUARDIANS AND WARDS, IN ORDER TO PROTECT ALL PERSONS, REGARDLESS OF AGE, HEALTH OR CONDITION OF DEPENDENCY.

A. The Common Law Has Been Particularly Solicitious In Protecting Vulnerable Persons From Homicide.

"One of the greatest obligations of organized governments is the preservation of human life." J. Miller, *Handbook of Criminal Law* 251 (1934). The philosophy of natural rights on which our system of government is based holds that the right to life is natural to the individual and superior to any government. The Declaration of Independence proclaims that the right to life is an "unalienable" right and, as such, is not subject to waiver or forfeiture. M. White, *The Philosophy of the American Revolution* 196 *passim* (1978). Moral philosophers, like Francis Hutcheson, John Locke, and Jean Jacques Burlamaqui, to whom the Founding Fathers were greatly indebted, taught that it is a person's duty to preserve his life. The right to life is derived from this duty, and, for this reason, cannot be alienated or renounced. White at 204-205. It was not to define or recognize, but to "secure," this right that "Governments are instituted among Men." The notion that the life of an incompe-

tent, disabled individual is merely a "state interest" is repugnant to our understanding of human rights.

The inherent right to life was "secured" by the common law through the prohibition of homicide and suicide. *See generally*, G. Williams, *The Sanctity of Life and the Criminal Law* (1957); Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 Minn. L. Rev. 969 (1958). At common law, homicide is the killing of one human being by another, and may be committed through deliberate starvation. 4 W. Blackstone, *Commentaries on the Laws of England* 196 (University of Chicago Press 1979).

Criminal liability for homicide may be based on a failure to act where there is a duty to act. La Fave & Scott, *Substantive Criminal Law*, sec. 3.3 (1986). That duty generally exists where one person stands in a special relationship to another. *Id.* Thus, the parent of a minor child, the husband or wife of a helpless spouse, and the guardian of a dependent ward may be guilty of homicide for failing to provide the child, spouse, or ward with the basic necessities of life—food, water, shelter, and essential medical care.[1] A leading American scholar on euthanasia, Yale Kamisar, has recently written that "letting people die when you have a special relationship with them and an affirmative duty to care for them is the legal equivalent (and . . . the logical equivalent) of

[1] *See Homicide by Withdrawing Food, Clothing, or Shelter*, 61 A.L.R. 3d 1207 (1975); *Homicide: Failure to Provide Medical or Surgical Attention*, 100 A.L.R. 2d 483 (1965). Failure to act may constitute a breach of a legal duty in other relationships, including that of physician and patient. Although "[t]he outer limits of criminal liability for inaction are hardly free from doubt, . . . it seems fairly clear under existing law that the special and traditional relationship of physician and patient imposes a 'legal duty to act,' particularly where the patient is helpless and completely dependent on the physician, and that the physician who withholds life-preserving medical means of the type described above [*e.g.*, an oxygen bottle] commits criminal homicide by omission." Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 Minn. L. Rev. 969, 982-83 n.41 (1958).

killing them." Kamisar, Introduction to "The Slide to 'Mercy-Killing.'" *Child and Family Reprints Booklet Series* at x (1987).

Family members have never been exempt from the law of homicide. 1 Blackstone 202-03. Because of their intimate relationships, members of families are deeply affected by each other's emotional, financial and physical condition. These influences may rupture the natural bonds of affection, resulting in harm to parents, spouses or children. The law intervenes in such intensely emotional situations to fortify the natural bonds, to establish objective guidelines for personal decisionmaking, to demonstrate what is right and wrong, and, ultimately, to protect human life and health.

The homicide laws of every state are directly implicated by the action proposed by petitioners. Some courts have concluded, without analysis, that the law of homicide does not apply to the withdrawal of assisted feeding from an incompetent patient because the person's underlying condition, and not the withdrawal of food, is the cause of death. *See In re Gardner*, 534 A.2d 947 (Me. 1987); *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N.E.2d 626 (1986). As the testimony in this case clearly indicates, however, Nancy Cruzan is not terminally ill or imminently dying. Her disability renders her incapable of feeding herself, but she can be fed without pain, complication, or undue expenses. But for the withdrawal of the assisted feeding, Nancy Cruzan will live for many years. Indeed, this is why her case is in court; if the food and fluids are not withdrawn, Nancy will not die. Her death is the intended result, "the natural and probable consequence" of the withdrawal of her feeding tube. Trial Trans. at 437. This is sufficient to establish proximate causation. La Fave & Scott, *Substantive Criminal Law*, secs. 3.3(d), 3.12.

Petitioners' analysis of proximate causation breaks down when it is applied to other incompetent persons. Infanticide, for example, cannot be defended because of the physical incapacity of the infant to provide its own nourishment. The argument that Nancy Cruzan's death would be caused by her underlying medical condition is advanced not because it is justified by the facts, but because of her diminished "quality of life" and her presumed consent. Neither consideration is relevant in the establishment of proximate causation.

Second, acceptance of petitioners' argument would undermine the settled principle that consent is not a defense to homicide. Petitioners assert that Nancy would agree to the withdrawal of her feeding tube if she were competent. But consent of the victim is not a justification for homicide.[2]

Third, granting the relief requested by petitioners would call into question the doctrine that culpability for homicide does not depend on the medical or physical condition of the victim at the time that death is induced. Given the requisite mental state, liability may be imposed where the act or omission (where there is a duty to act) merely hastens the moment of death. La Fave & Scott, *Substantive Criminal Law*, sec. 3.3 (1986).[3]

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[2] *State v. Marti*, 290 N.W.2d 570 (Iowa 1980); *State v. Moore*, 25 Iowa 128 (1868); *State v. Cobb*, 229 Kan. 522, 625 P.2d 1133 (1981); *People v. Roberts*, 211 Mich. 187, 178 N.W. 690 (1920); *Blackburn v. State*, 23 Ohio St. 146 (1872); *State v. Fuller*, 203 Neb. 233, 278 N.W.2d 756 (1979); *Turner v. State*, 119 Tenn. 663, 108 S.W. 1139 (1907); Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 Minn. L. Rev. 969, 970 n.9 (1958).

[3] "Though a person may be at the threshold of death, if the spark of life is extinguished by a wrongful act, it is sufficient for a conviction." *State v. Mally*, 139 Mont. 599, 609, 366 P.2d 868, 873 (1961) (affirming involuntary manslaughter conviction of husband who failed to obtain medical care for his wife following her accidental injury, where there was evidence that such failure hastened her death, even though she was already seriously ill from a fatal disease). *See also People v. Lanagan*, 81 Cal. 142, 22 P. 482 (1889); *People v. Ah Fat*, 48 Cal. 61, 64 (1874); *Blackburn v. State*, 23 Ohio St. 146, 163 (1872).

Finally, even if it is assumed that the withdrawal of life-sustaining food and fluids does not strictly violate the homicide laws of Missouri, allowing such action in this case will inevitably lead to pressure in both law and medicine to sanction the use of lethal injections to hasten the starvation and dehydration of the patient in a "humane" manner. Death from starvation may take several days.[4] This death may cause pain and produce a visible physiological change in the patient.[5] However, since death is certain and has been purposely induced, the need for the patient to endure the starvation, and the need for family, physicians and nurses to witness the process, will be questioned. There will be a demand to shorten that time by providing a lethal injection.[6] It is incontrovertible that such conduct would constitute homicide.[7]

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[4] Joseph Gardner and Paul Brophy died eight days after their feeding tubes were removed; Marcia Gray died 15 days after withdrawal.

[5] During the fifteen days that it took Marcia Gray to succumb, she lost 50 lbs., and Valium was administered to control her seizures. Eisenstadt, 'An Ordeal Ends: Marcia Gray Dies," *Providence Journal*, December 1, 1988, p. A01, p. A2. Petitioners have anticipated this by requesting the trial court to maintain the gastric tube itself, while withholding nutrition, in order to hydrate Nancy and give her medication to prevent seizures during the time it takes her to die. Tr. at 440.

[6] The ethics of lethal injection are already being debated. *See* Note, *Criminal Liability for Assisting Suicide*, 86 Col. L. Rev. 348 (1986); Beck, "Californians may be invited to vote on a right to die," *Chicago Tribune*, April 21, 1988, sec. 1, p. 23; Beck, "Helping the Comatose to Die," *Chicago Tribune*, March 20, 1986, sec. 1, p. 14; Letters, 259 J.A.M.A. 2094 (April 8, 1988).

[7] Under petitioners' reasoning, one could not object to lethal objections on the basis of protecting the patient because the patient is presumed to prefer death to life in her present, disabled condition. Tr. at 444-45, 520-21. A lethal injection merely hastens the implementation of her (presumed) intent. If not to protect the

B. American Law Has Never Permitted "Mercy-Killing" Or Accepted Benevolent Motive As A Justification For Homicide.

The plight of a family emotionally overwhelmed by the illness of a loved one appeals in a powerful way to the compassion of any judge or jury that has ever considered a "mercy-killing." But the law has always rejected a humanitarian or altruistic motive as a defense to homicide. *See* La Fave & Scott, *Substantive Criminal Law*, sec. 3.6 at 320 (1986).[8]

The Anglo-American prohibition of euthanasia has "ancient roots." *Cf. Bowers*, 478 U.S. at 192. "Jewish, Christian, and Islamic teachings alike have always maintained that deliberate killing in case of abnormality or incurable illness is wrong." Louisell, *Euthanasia and Biathanasia: On Killing and Dying*, 22 Cath. U.L. Rev. 723, 725 (1973). The sanctity of human life, as protected by the common law, holds that human dignity is intrinsic. It does not depend on the person's race, sex, intelligence, or physical or mental condition. Nor does it depend on the person's ability to communicate or, if ill, his prognosis for recovery.

Petitioners' case, borne of the evident stress that families often experience because of the illness of a loved

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patient, on what other grounds could objections to lethal injections be based? Any moral or legal distinction between withdrawing food and fluids and administering a lethal injection would quickly collapse.

[8] *See People v. Matlock*, 51 Cal. 2d 682, 336 P.2d 505 (1959); *Gilbert v. State*, 487 So.2d 1185 (Fla. Dist. Ct. App. 1986), *review denied*, 494 So.2d 1150 (Fla. 1986); *Commonwealth v. Pierce*, 138 Mass. 165 (1884); *State v. Elders*, 98 N.J.L. 236, 119 A. 15 (1922); *People v. Kirby*, 2 Park. Crim. Rep. (N.Y.) 28 (1823); *State v. Bouse*, 199 Or. 676, 264 P.2d 800 (1953); *Martin v. Commonwealth*, 184 Va. 1009, 1019, 37 S.E.2d 43, 47 (1946) ("the right to life . . . is not only sacred in the estimation of the common law, but it is inalienable"). *See also*, Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 Minn. L. Rev. 969, 970 n.9 (1958).

one, ultimately rests on the classic motives of euthanasia. They believe that this is in Nancy's "best interest" because they believe that this is what she would want and because "we can see no purpose in Nancy being forced to exist," for possibly many years in a "totally helpless" condition. Tr. at 444, 520-21. Her father explained that he could see "no purpose" in "forcing her to endure the indignities that she [is] going through now," and believes that "it is beneath her dignity to continue in this condition." Tr. at 444-45.

Missouri's prohibition of euthanasia is necessary to protect vulnerable patients—competent and incompetent—and to maintain the integrity of the family and of the medical profession. Louisell, 22 Cath. U.L. Rev. at 733-42.[9] The prohibition of euthanasia upholds the inherent value of the patient's life. Without such support from the law, *competent* disabled patients will feel an increased "obligation" to spare their families the burden of their illness. The universal fear of frailty and dependence by the elderly will increase. In upholding the sanctity of human life through prohibitions on homicide, suicide and euthanasia, society, through experience, has understood and sought to control such pressures through the law.

C. The Common Law Prohibition Of Suicide Demonstrates That Personal Autonomy Does Not Extend To Inducing One's Own Death Through The Refusal Of Food And Fluids.

This appeal directly challenges the prohibition of suicide and assisted suicide. The common law's opposition

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[9] *See* Kass, *Neither for Love Nor Money: Why Doctors Must Not Kill*, 94 Pub. Int. 25 (Winter 1989). The authority of the state to regulate medical practice is firmly rooted in its powers to protect the health, safety and welfare of the community. *Whalen v. Roe*, 429 U.S. 589, 603 (1977); *Bigelow v. Virginia*, 421 U.S. 809, 827 (1975); *Dent v. West Virginia*, 129 U.S. 114, 122-23 (1989). The state also has full authority to place ethical boundaries on the practice of medicine. *Semler v. Dental Examiners*, 294 U.S. 608, 612 (1935).

to suicide has "ancient roots." *Cf. Bowers*, 478 U.S. at 192. Suicide was a felony at common law and called, by Blackstone, "self-murder." 4 Blackstone, 188-89. The common law held that "no man hath a power to destroy life" and therefore "ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on oneself." *Id. See generally*, Marzen, *Suicide: A Constitutional Right?*, 24 Duquesne L. Rev. 1 (1985). Suicide was not excused by the common law "to avoid those ills which [persons] had not the fortitude to endure." *See* 4 Blackstone 189. The prohibition of suicide extended to one who "deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death." *Id.*

Over the past century, the common law, and the American states, began to recognize that the punishment of a completed suicide could not reach the perpetrator and that it was unfair to punish the surviving relatives. 4 Blackstone 190. For this reason, and this reason alone, American legislatures came to believe that there could be no effective punishment for a completed suicide and no just punishment on the suicide's relatives. *See generally*, Marzen, 24 Duquesne L. Rev. 1. Consequently, the states gradually rescinded their proscriptions against suicide. A majority of the states, however, have enacted statutes specifically prohibiting assisted suicide.[10]

Notwithstanding decriminalization, the states retain a vital interest in preventing suicide. That interest is manifested in laws forbidding assisted suicide,[11] allowing the use of nondeadly force to thwart suicide attempts,[12] and

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[10] *See Marzen, Suicide: A Constitutional Right?*, 24 Duquesne L. Rev. 1, 97 (1985).

[11] *Id.*

[12] *See, e.g.*, Alaska Stat., sec. 11.81.430(a)(4) (1983); Ark. Code Ann., sec. 5-2-605(4) (1987); Colo. Rev. Stat., sec. 18-1-703(1)(d) (1986); Haw. Rev. Stat., sec. 703-308(1)(b) (1976); Mo. Ann. Stat., sec. 563.016(5) (Vernon 1979); Ky. Rev. Stat., sec. 503.100(1)(a) (1985); N.H. Rev. Stat., sec. 627:6(vi) (1986);

providing for the involuntary commitment of individuals who, as a result of mental illness, may harm themselves.[13] Consistent with the protection of these interests, courts have intervened to block the starvation of persons who no longer desire to live.[14]

Recent case law reiterates the prohibition of suicide. In affirming the murder conviction of Roswell Gilbert for the "mercy-killing" of his wife, the Florida District Court of Appeals rejected his argument that his ailing wife's repeated requests to die constituted an oral "constructive mercy will" excusing his conduct:

> It is ridiculous and dangerous to suggest . . . that a constructive mercy will was left when Emily said . . . "I'm so sick I want to die." Such a holding would judicially sanction open season on people who, although sick, are also chronic complainers.

Gilbert v. State, 487 So.2d 1185, 1191 (Fla. Dist. Ct. App. 1986), *review denied*, 494 So.2d 1150 (Fla. 1986). Speaking more broadly, the New Jersey Supreme Court has said that the "difference between passively submitting to death and actively seeking it . . . may be merely verbal, as it would be if an adult sought death by starvation instead of a drug." *John F. Kennedy Memorial*

N.J. Stat. Ann., sec. 2C:3-7(e) (West 1982); N.Y. Pen. Law, sec. 35.10(4) (McKinney 1987); 18 Pa. Cons. Stat. Ann., sec. 508(d) (Purdon 1983); Or. Rev. Stat., sec. 161.209 (Repl. 1983); Wis. Stat. Ann., sec. 939.48(5) (West 1982).

[13] *See, e.g.*, Calif. Welf. & Inst. Code, secs. 5150, 5200, 5206, 5213, 5250(a), 5256.6, 5260 (West 1984).

[14] *See, e.g., In re Caulk*, 125 N.H. 226, 232, 480 A.2d 93, 97 (1984) (force-feeding of suicidal inmate); *Von Holden v. Chapman*, 87 A.D.2d 66, 68, 450 N.Y.S.2d 623, 626 (1982) (same); *State ex rel. White v. Narick*, 292 S.E.2d 54, 57-58 (W. Va. 1982) (same); *see also Commissioner of Correction v. Myers*, 379 Mass. 255, 262-63, 399 N.E.2d 452, 456-57 (1979) (authority of prison administrator to compel kidney dialysis treatment of inmate who wanted to die); *but see Zant v. Prevatte*, 248 Ga. 832, 834, 286 S.E.2d 715, 717 (1982) (*contra*).

Hospital v. Heston, 58 N.J. 576, 581, 279 A.2d 670, 672-73 (1971). "If the State may interrupt one mode of self-destruction, it may with equal authority interfere with the other." *Id.* at 581-82, 279 A.2d at 673.

That the intentional withdrawal of assisted feeding to directly induce the death of a patient is tantamount to assisted suicide has been explicitly or implicitly acknowledged by recent courts, or individual judges thereof. *Brophy v. New England Sinai Hospital, Inc.* 398 Mass. 417, 443-53, 497 N.E.2d 626, 640-46 (1986) (Lynch, J., O'Connor, J., dissenting); *In Westchester County Medical Center*, 139 A.D.2d 344, 349, 532 N.Y.S.2d 133, 142 (1988) (Balletta, J., dissenting), *rev'd*, 534 N.Y.S.2d 886, 531 N.E.2d 607 (1988); *In re Grant*, 109 Wash.2d 545, 570, 575, 747 P.2d 445, 458, 360 (1987) (Anderson, J., disseting, Goodloe, J., dissenting), *modified*, 757 P.2d 534 (Wash. 1988). In *Bouvia v. Superior Court*, 179 Cal.App.3d 1127, 1146, 225 Cal.Rptr. 297, 307 (1986), Justice Compton, concurring in the judgment to allow a *competent*, non-terminally ill person to refuse assisted feeding, acknowledged that the action was suicide, but explicitly advocated a *doctor-assisted* suicide as more humane than starvation alone.

This Court has never accepted the claim that suicide is part of the constitutional right of privacy. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Court rejected an argument that "conduct involving consenting adults only is always beyond state regulation," and identified suicide as an example of conduct the states may legitimately prohibit. *Id.* at 68 & n.15. Again, in *Roe v. Wade*, 410 U.S. 113 (1973), the Court commented, "[I]t is not clear to us that the claim asserted by some . . . that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions." *Id.* at 154.

The law against suicide may not be strictly implicated by this case because suicide, at common law, requires a

specific intent to die, and Nancy Cruzan is incompetent. But the theory of the petitioners negates this limitation. They claim that food and fluids should be withdrawn because Nancy Cruzan would not want to live in this condition. Tr. 444-45, 520-21. To implement this alleged desire would effectively implement suicidal intentions. This amounts to assisted (substituted) suicide, which the common law clearly proscribed and which is still explicitly proscribed by the majority of states. The motives and intentions that petitioners seek to implement by "substituted judgment" are exactly the kind of motives that the common law has always proscribed.

D. The Common Law Regulation Of Guardianship Does Not Permit Guardians To Cause The Death Of Their Wards By Depriving Them Of Food And Fluids.

Another source of law that indicates that a right to refuse or withdraw food and fluids from an incompetent ward is not "deeply rooted in this Nation's history and tradition" is found in the law of guardianship. At common law, the crown was invested with the guardianship and supervision of those persons who, by reason of infancy or other condition of dependency, could not take care of themselves. *See e.g., Eyre v. Shaftsbury*, 24 Eng. Rep. 659 (Ch. 1722); *Falkland v. Bertie*, 23 Eng. Rep. 814 (Ch. 1696). This authority of *parens patriae* passed into American practice upon the establishment of courts of law and equity. *Ex parte Daedler*, 194 Cal. 320, 228 P. 467, 469 (1924).[15]

> The rationale of parens patriae is that the State must intervene in order to protect an individual who is not able to make decisions in his own best interest. The decision to exercise the power of parens patriae must reflect the welfare of society, as a whole, but mainly it must balance the individual's right to be free from interference against the individual's need

[15] *See generally*, Custer, *The Origins of the Doctrine of Parens Patriae*, 27 Emory L.J. 195 (1978).

to be treated, if that treatment would in fact be in his best interest.

In re Weberlist, 79 Misc.2d 753, 360 N.Y.S.2d 783, 786 (Sup. Ct. 1974). This Court has acknowledged that the states may exercise this power for the protection of minors and other dependent persons.[16]

Pursuant to this authority, courts have ordered life-sustaining medical treatment for parents of minor children[17] and for pregnant women.[18] Justifying this ju-

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[16] *See Parham v. J.R.*, 442 U.S. 584, 603 (1979); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944).

[17] *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964), *rehearing en banc denied*, 331 F.2d 1010 (1964) (mother of seven-month-old child); *United States v. George*, 239 F. Supp. 752 (D. Conn. 1965) (father of four children); *Hamilton v. McAuliffe*, 277 Md. 336, 353 A.2d 634 (1976) (father of two-year-old child); *Application of Winthrop University Hospital*, 128 Misc.2d 804, 490 N.Y.S. 996 (Sup. Ct. 1985) (mother of two children); *Powell v. Columbia Presbyterian Medical Center*, 49 Misc. 2d 215, 267 N.Y.S.2d 450 (1965) (mother of six children); *Holmes v. Silver Cross Hospital*, 340 F. Supp. 125 (N.D. Ill. 1972) (recognizing rule); *but see In re Osborne*, 294 A.2d 372 (D.C. Ct. App. 1972) (*contra* where there is no evidence that patient's death would lead to abandonment of the patient's children); *Wons v. Public Health Trust of Dade County*, 500 So.2d 679, 688 (Fla. Dist. Ct. App. 1987), *aff'd*, 541 So.2d 96, 97-98 (Fla. 1989) (same); *St. Mary's Hospital v. Ramsey*, 465 So.2d 666, 668-69 (Fla. Dist. Ct. App. 1985) (same).

[18] *In re A.C.*, 533 A.2d 611 (D.C. Ct. App. 1987) (terminally-ill mother of 26-week-old unborn child), *vacated pursuant to order granting rehearing en banc*, 539 A.2d 203 (D.C. Ct. App. 1988); *Jefferson v. Griffin Spalding County Hospital Authority*, 247 Ga. 86, 274 S.E.2d 457 (1981) (mother of full-term unborn child); *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964) (mother of 32-week-old unborn child); *In re Jamaica Hospital*, 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (Sup. Ct. 1985) (mother of 18-week-old unborn child); *Crouse v. Irving Memorial Hospital, Inc.*, 127 Misc. 2d 101, 485 N.Y.S.2d 443 (Sup. Ct. 1985) (mother of child to be born by cesarean section); *but see Taft v. Taft*, 388 Mass. 331, 446 N.E.2d 395 (1983) (pregnant women could not be required to submit to an operation in order to assist her in carrying her baby to term).

dicial intervention in the case of the mother of an infant, Judge J. Skelly Wright wrote:

> The patient, 25 years old, was the mother of a seven-month-old child. The state, as parens patriae, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonments. The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of the mother.

Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (D.C. Cir. 1964).

A fundamental duty of personal guardians is to provide sustenance for their disabled wards. Breach of that duty may result in criminal liability.[19]

The law of guardianship has never presumed that guardians could implement the subjective desires of their wards. Rather, guardians have been held to objective standards. Only in recent years have guardians been able to "substitute" their judgment to implement the presumed desires of their wards, and this rule does not command a majority. *In re Marriage of Drews*, 115 Ill.2d 201, 503 N.E.2d 339 (1986), *appeal dismissed for want of jurisdiction, cert. den., Drews v. Drews*, 107 S.Ct. 3222 (1987). If the guardian is to apply a "best interests" standard, that standard is a question of law, but the law of homicide and suicide have always held that it is not in the best interests of a non-terminal patient

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[19] *See, e.g., People v. Flayhart*, 136 A.D. 2d 767, 523 N.Y.S.2d 225 (1988) (affirming the criminal negligent homicide convictions of the brother and sister-in-law of the deceased, a 36-year-old mentally retarded and physically disabled man, who died as a result of malnutrition and inflammation of the lungs while in defendants' care); *Lewis v. State*, 72 Ga. 1264 (1883) (affirming the murder conviction of the guardian of the deceased, a ten-year-old orphan, who died from want of proper food, exposure and mistreatment); *Regina v. Instan*, 17 Cox. Crim. Cas. 602, 1 Q.B. 450 (1893) (affirming manslaughter conviction of the niece of the deceased, a 73-year-old woman, who died from malnutrition while in defendant's care).

to die. If, on the other hand, the guardian is to apply a "substituted judgment" that the patient desired death due to her disability, then the guardian implements suicidal intentions, which the law proscribes. The law does not allow deliberate starvation of an incompetent patient under either standard.

III. THERE IS NO CONTEMPORARY LEGAL CONSENSUS THAT THE RIGHT TO REFUSE MEDICAL TREATMENT ENCOMPASSES A RIGHT OF A GUARDIAN TO WITHDRAW LIFE-SUSTAINING FOOD AND FLUIDS FROM AN INCOMPETENT, VULNERABLE PATIENT, WHERE THE PATIENT IS NEITHER TERMINALLY ILL NOR IMMINENTLY DYING.

The right to refuse medical treatment is of common law origin. *See generally*, Byrn, *Compulsory Lifesaving Treatment For The Competent Adult*, 44 Fordham L. Rev. 1 (1975). It is a "settled principle" of the common law that "a competent, conscious adult patient has the 'final say' on whether to submit to medical treatment." *Id.* at 3. Formal recognition of this right is found in the doctrine of informed consent and the tort of battery for unconsented medical procedures.[20] In its traditional formulation, the right to refuse medical treatment was never premised on any right of privacy or considered to be of constitutional status.[21] State courts continue to re-

[20] *See generally*, R. Faden & P. Beauchamp, *A History and Theory of Informed Consent* (1986) at 25-49, 114-150.

[21] Byrn at 5 & n.21. In support of their claim that the right to refuse medical treatment is of constitutional dimension, petitioners and several *amici* rely on this Court's decision in *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891). This reliance is clearly misplaced. *Botsford* held that in the absence of appropriate statutory authority, a district court could not order the plaintiff in a personal injury action to submit to a medical examination to determine the nature and extent of her injuries. *Id.* at 251. *Botsford* was decided on procedural, not substantive, grounds. *See Sibbach v. Wilson & Co.*, 312 U.S. 1, 11-12 (1941). Moreover, in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), this Court upheld the constitutionality of Rule 35 of the Federal Rules of Civil Procedure, which authorizes such an order, rejecting defendant's argument, based on *Botsford*, that the rule invaded his right to privacy. *Botsford* does not recognize or create a federal constitutional right to refuse medical treatment.

solve these issues under common law principles.[22]

An informed decision regarding medical treatment requires rational capacity on the part of the patient, voluntariness, and a clear understanding on the part of the patient of the benefits and risks of the proposed treatment alternatives or nontreatment, together with a full understanding of the nature of the disease and the prognosis. *Cruzan*, 760 S.W.2d at 417, citing Wanzer, *et al.*, *The Physician's Responsibility Toward Hopelessly Ill Patients*, 310 New Eng. J. Med. 955, 957 (1984). "In the absence of these three elements, neither consent nor refusal can be informed." *Id.*[23]

Where an adult, competent patient makes a decision under these circumstances, the law ordinarily will honor that decision. As a corollary of this principle, a physician

[22] *See In re Westchester County Medical Center*, 72 N.Y.2d 517, 528, 531 N.E.2d 607, 611 (1988); *In re Storar*, 52 N.Y.2d 363, 376-77, 438 N.Y.S.2d 266, 272-73, 420 N.E.2d 64, 70 (1981); *In re Gardner*, 534 A.2d 947, 951 (Me. 1987). Many of those courts which have purported to find constitutional warrant for their decisions have also relied on the common law. *See, e.g., Rasmussen v. Fleming*, 154 Ariz. 207, 215-16, 741 P.2d 674, 683 (1987); *In re Drabik*, 200 Cal.App.3d 185, 206 n.20, 245 Cal.Rptr. 840, 853 n.20 (1988); *Corbett v. D'Alessandro*, 487 So.2d 368, 370 (Fla. Dist. Ct. App. 1986); *In re LHR*, 253 Ga. 439, 445, 321 S.E.2d 716, 722 (1984); *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 430, 497 N.E.2d 626, 633 (1986); *In re Torres*, 357 N.W.2d 332, 339 (Minn. 1986); *In re Farrell*, 108 N.J. 335, 347, 529 A.2d 404, 410 (1987); *In re Colyer*, 99 Wash.2d 114, 119, 660 P.2d 738, 741 (1983).

[23] *See, e.g., Truman v. Thomas*, 27 Cal.3d 285, 165 Cal. Rptr. 308, 611 P.2d 902 (1980) (refusal to consent to treatment must be informed).

who administers medical treatment without the patient's informed consent commits a battery. W. Keeton, *Prosser & Keeton on Torts* 189-90 (5th Ed. 1984).[24] The right to refuse medical treatment, however, is not absolute and must be balanced against various compelling "state interests," among which are the prevention of homicide and suicide. *Cruzan*, 760 S.W.2d at 419.[25]

Prior to the New Jersey Court's decision in *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), the majority of decisions dealing with the refusal of an individual to accept medical treatment involved mature, competent adults.[26] The right to refuse treatment in these cases was based explicitly on the calculated decision of the patient. *See Erickson v. Dilgard*, 44 Misc.2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962). That right, however, could not be exercised by an incompetent patient be-

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[24] "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault . . . ." *Schloendorff v. Society of the New York Hospital*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914) (operation to remove a tumor, after the patient had specifically forbidden the operation, was an "assault"). *Accord, Berkey v. Anderson*, 1 Cal. App. 3d 790, 82 Cal. Rptr. 67 (1969); *Pratt v. Davis*, 118 Ill. App. 161 (1905), *aff'd*, 224 Ill. 300, 79 N.E. 562 (1906); *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905); *Rolater v. Strain*, 390 Okla. 572, 137 P. 96 (1913); *Gray v. Grannagle*, 423 Pa. 144, 223 A.2d 663 (1966); *Cooper v. Roberts*, 220 Pa. Super. 260, 286 A.2d 647 (1971).

[25] "[N]o court has yet found an absolute constitutional right to refuse lifesaving medical treatment." *Foster v. Tourtellotte*, 704 F.2d 1109, 1112 (9th Cir. 1983).

[26] *See, e.g., United States v. George*, 239 F. Supp. 752 (D. Conn. 1965); *In re Osborne*, 294 A.2d 372 (D.C. Ct. App. 1972); *In re Estate of Brooks*, 32 Ill.2d 361, 205 N.E.2d 435 (1965); *In re Yetter*, 62 Pa. D. & C.2d 619 (C.P. 1973); *Erickson v. Dilgard*, 44 Misc.2d 27, 252 N.Y.S.2d 705 (Sup. Ct. 1962)

cause the *sine qua non* of exercising the right—cognitive capacity—did not exist.[27] Prior to *Quinlan*, the right to refuse medical treatment generally was considered a *personal* right of the patient which could not be exercised by third parties, particularly where refusal of treatment would result in the patient's death.[28]

In cases involving incompetent patients, on the other hand, courts have traditionally distinguished between extraordinary and ordinary treatment:

> Ordinary means are all medicines, treatments, and operations, which offer a reasonable hope of benefit and which can be obtained and used without excessive expense, pain, or other inconvenience. Extraordinary means are all medicines, treatments, and operations, which cannot be obtained or used without excessive expense, pain, or other inconvenience, or [which] if used, would not offer a reasonable hope of benefit.

Eichner v. Dillon, 73 A.D.2d 431, 441 n.5, 426 N.Y.S.2d 517 n.5 (1980), *modified*, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64 (1981).[29]

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[27] *See In re Osborne*, 294 A.2d 372 (D.C. App. 1972); *John F. Kennedy Memorial Hospital v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971); *Long Island Jewish-Hillside Medical Center v. Levitt*, 73 Misc.2d 395, 342 N.Y.S. 356 (Sup. Ct. 1974); *Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964); *Lane v. Candura*, 6 Mass. App. 377, 376 N.E.2d 1232 (1978); *In re Yetter*, 62 Pa. D. & C.2d 619 (1973); *State Department of Human Services v. Northern*, 563 S.W.2d 197 (Tenn. App. 1978); *In re Schiller*, 148 N.J. Super. 168, 372 A.2d 360 (1977); *In re Melideo*, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (1976).

[28] *See, e.g., Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1008 (D.C. Cir. 1964) (spouse); *Collins v. Davis*, 44 Misc. 2d 622, 254 N.Y.S.2d 666 (Sup. Ct. 1964) (spouse); *Application of Long Island Jewish-Hillside Medical Center*, 73 Misc. 2d 395, 342 N.Y.S. 356 (Sup. Ct. 1974) (spouse).

[29] *See also Severns v. Wilmington Medical Center, Inc.*, 425 A.2d 156, 159 (Del.Ch. 1980); *In re* PVW., 424 So.2d 1015, 1018 (La. 1982) (allowed withdrawal of mechanical ventilator); *In re*

Beginning with the *Quinlan* decision in 1976, however, many courts have authorized the removal of life-sustaining treatment from incompetent patients based upon the "substituted judgment" of third parties. *Cruzan*, 760 S.W.2d at 412 n.4. But it was not until 1986 that the first state court authorized the withdrawal of food and fluids from an incompetent patient. *See Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N.E.2d 626 (1986).

Contrary to the suggestion of petitioners and certain *amici*, there is no contemporary judicial consensus authorizing removal of assisted feeding. Justice Nolan, dissenting from the 4-3 decision in *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N.E.2d 626 (1986), which allowed the removal of assisted feeding, stated that he could "think of nothing more degrading to the human person than the balance which the court struck today in favor of death and against life." *Id.* at 443, 497 N.E.2d at 640. "Food and water are basic human needs," he wrote. "They are not medicines and feeding them to a patient is just not medical treatment." *Id.* at 442, 497 N.E.2d at 640. Justice Lynch, separately dissenting, charged the majority with "nullify[ing], if only in part, the law against suicide." *Id.* at 443, 497 N.E.2d at 640. "No case in this Commonwealth has ever construed the right to privacy and bodily integrity as more than the right to avoid invasive treatments and certain other bodily invasions under appropriate conditions." *Id.* at 445, 497 N.E.2d at 641. Justice

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Storar, 52 N.Y.2d 363, 380-82, 438 N.Y.S.2d 266, 274-76, 420 N.E. 2d 64, 72-74 (1981) (refusing to discontinue blood transfusions); *In re Quackenbush*, 156 N.J. Super. 282, 290 n.2, 383 A.2d 785, 789 n.2 (1978); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417, 423-24 (1977); *In re Quinlan*, 70 N.J. 10, 28-29, 355 A.2d 647, 657 (1976); *John F. Kennedy Memorial Hospital v. Heston*, 58 N.J. 576, 582-83, 279 A.2d 670, 673 (1971). *See generally*, Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 Stan. L. Rev. 213, 326 (1975).

O'Connor, separately dissenting, challenged the majority's implicit establishment of a right to suicide and euthanasia. *Id.* at 448-53, 497 N.E.2d at 643-46.

Dissenting in *In re Gardner*, 534 A.2d 947 (Me. 1987), Justice Clifford, joined by Justices Roberts and Wathen, argued that the 4-3 majority, in allowing the withdrawal of nutrition and hydration, had undervalued the state's interest in "preserving the life of Joseph Gardner as an individual and in preserving life in general." *Id.* at 957. Justice Clifford stressed that the majority had failed to distinguish properly between medical treatment and food and water. *Id.* at 958. By allowing the withdrawal of food and water, the majority "ignore[d] the legitimate interest our society has in preventing such decisions from being based on the quality of life" and failed to defer to the Maine Legislature's judgment in the Living Will Act that nutrition and hydration are different from medical treatment. *Id.*

More recently, the rationale of these dissents has been reflected in the majority opinions of the New York Court of Appeals and the Washington Supreme Court, which refused to authorize the starvation of incompetent wards by their court-appointed guardians. *See In re Westchester County Medical Center*, 72 N.Y.2d 517, 531 N.E.2d 607 (1988); *In re Grant*, 747 P.2d 445, *modified*, 757 P.2d 534 (Wash. 1988). Thus, the Missouri Supreme Court is not unique in its judgment. The withdrawal of life-sustaining food and fluids remains highly controversial.

Although there is no *judicial* consensus, there is an overwhelming *legislative* consensus that the withdrawal of food and fluids is unacceptable. Thirty-eight states and the District of Columbia have adopted statutes authorizing competent persons to execute living wills, directing the course of their medical treatment in the event of their incompetency.[30] These laws give explicit recognition to the common law right to refuse medical treat-

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[30] *See generally*, 14 J. Contemp. Law 105 (Spring 1988).

ment. Most of these statutes, however, treat the provision of food and fluids differently from other forms of life-sustaining treatment. Nineteen states explicitly exclude nutrition and hydration from the definition of "life-prolonging procedures" that may be withheld or withdrawn.[31] At least eleven other states and the District of Columbia implicitly exclude nutrition and hydration by limiting the withholding or withdrawal of life-prolonging procedures to patients who are terminally ill and who will die *with or without* the procedure.[32] In three other

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[31] Ariz. Rev. Stat. sec. 36-3201(4) (1986); Conn. Gen. Stat. Ann., sec. 19a-510(1) (1989); Fla. Stat. Ann., sec. 765.03(3)(b) (1986); Ga. Code Ann., sec. 31-32-2(5) (1985); Haw. Rev. Stat., sec. 3270-2 (1987 Supp.); Ill. Rev. Stat., ch. 110 1/2, sec. 702(c) (1989); Ind. Code, sec. 16-8-11-4 (1989 Supp.); Iowa Code Ann., sec. 144A.2(5) (1989); Me. Rev. Stat. Ann., tit. 22, sec. 2921 (4) (1988 Supp.); Md. Health-General Code Ann., sec. 5-602(c) (1988 Supp.) (declaration form); Mo. Stat. Ann., sec. 459.010(3) (Vernon 1989); N.H. Rev. Stat. Ann., sec 137-H:2(II) (1988 Supp.); Okla. Stat. Ann., tit. 63, sec. 3102(4) (1989 Supp.); Or. Rev. Stat. Ann., sec. 97.050(3) (1983); S.C. Code Ann., sec. 44-77-20(2) (1988 Supp.); Tenn. Code Ann, sec. 32-11-103(5) (Supp. 1988); Utah Code Ann., sec. 75-2-1103(6)(b) (Supp. 1989); Wis. Stat. Ann., sec. 154.01(5)(b) (West 1989); Wyo. Stat., sec. 35-22-101(a)(iii) (1988). Only Alaska specifically allows the withholding of nutrition and hydration. Alaska Stat., sec. 18.12.010 (1986).

[32] Ala. Code, sec. 22-8A-3(3) (1984); Cal. Health & Safety Code, sec. 7187(f) (1989 Supp.); Del. Code, tit. 16, sec. 2501(e) (1983); D.C. Code, sec. 6-2421(3) (1989); Idaho Code, sec. 39-4503(4) (1985); Kan. Stat. Ann., sec. 65-28, 102(c) (1985); La. Rev. Stat. Ann., sec. 1299.58.3(c) (declaration form); NM. Stat. Ann., sec. 24-7-2(F) (1986); Tex. Civ. Stat. Ann., sec. 4590h (Vernon 1989 Supp.); Vt. Stat. Ann., sec. 5252(5) (1987); Wash. Rev. Code Ann., sec. 70.122.020(4) (1989 Supp); W. Va. Code, sec. 16-30-2(3) (1985). Three other states allow life-sustaining procedures to be withdrawn only if the patient is in imminent danger of death: Colo. Rev. Stat., sec. 15-18-103 (1986 Supp.); Miss. Code Ann., sec. 41-41-101 *et seq.* (1989 Supp.); Mont. Code Ann., sec. 50-9-101 *et seq.* (1987). Arkansas is the only state with a living will statute that does not require the patient to be in a terminal condition. Ark. Code, sec. 20-17-201 (1987).

states, the definitions of "life sustaining procedure," [33] "extraordinary means," [34] and "life-prolonging procedure" [35] could be construed to exclude artificially administered nutrition and hydration. The nearly unanimous refusal of state legislatures to authorize the withdrawal of food and fluids in their living will statutes strongly weighs against the judgment that the deliberate starvation of incompetent patients is encompassed within the constitutional right of privacy.[36]

The insubstantiality of petitioners' constitutional claim to withdraw life-sustaining food and fluids from their incompetent ward on the basis of her pre-trauma statements becomes apparent upon an examination of treatment cases involving Jehovah's Witnesses. Although the right of a *competent* patient to refuse life-sustaining blood transfusions on religious grounds is well-established,[37] the right of third parties to exercise such rights on behalf of *incompetent* parties is doubtful. In *In re Estate or Dorone*, 517 Pa. 3, 534 A.2d 452 (1987), the Supreme Court of Pennsylvania reviewed two orders appointing a temporary guardian of an unconscious patient for the purpose of consenting to the administration of blood transfusions. The orders were entered over the strenuous objections of the patient's parents who claimed that their son, a 22-year-old Jehovah's Witness, would,

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[33] Nev. Rev. Stat., sec. 449.570 (1987).

[34] N.C. Gen. Stat., sec. 90-321(a)(2) (1985).

[35] Va. Code, sec. 54.1-2982 (1988).

[36] Most of these statutes expressly provide that they do not permit, condone or authorize euthanasia, suicide, or any affirmative or deliberate act or omission to end life other than to permit the natural process of dying. *See generally*, 14 J. Contemp. Law 105 (Spring 1988).

[37] *See, e.g., In re Osborne*, 294 A.2d 372 (D.C. Ct. App. 1972); *St. Mary's Hospital v. Ramsey*, 465 So.2d 666 (Fla. Dist. Ct. App. 1985); *In re Brooks' Estate*, 32 Ill.2d 361, 205 N.E.2d 435 (1965).

if conscious, refuse the transfusions because of his religious beliefs.

In affirming the trial court's orders, the supreme court said:

> Turning to the ultimate decisions the judge rendered, we feel that they were absolutely required under the facts he had before him. Those facts established that medical intervention, which necessarily included blood transfusions, could preserve Mr. Dorone's life. When evidence of this nature is measured against third party speculation as to what an unconscious patient would want there can be no doubt that medical intervention is required. Indeed, in a situation like the present, where there is an emergency calling for an immediate decision, nothing less than a fully conscious contemporaneous decision *by the patient* will be sufficient to override evidence of medical necessity.

534 A.2d at 455 (emphasis in original). *Accord, Application of President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1964) (Opinion of J. Skelly Wright) (patient in *extremis* and not mentally competent to refuse blood transfusions); *John F. Kennedy Memorial Hospital v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971) (patient in shock upon admittance to hospital, disoriented and incoherent); *see also St. Mary's Hospital v. Ramsey*, 465 So.2d 666, 668 (Fla. Dist. Ct. App. 1985) (refusal of a parent or guardian to authorize a blood transfusion for another "is not an exercise of the right to *self*-determination, it is an assumed right to determine the destiny of another") (emphasis in original).

What is of particular significance in these cases is that the courts refused to allow third parties to refuse treatment on behalf of incompetent patients, notwithstanding strong evidence that the treatment envisioned would violate the patients' religious belief, an interest specifically guaranteed by the Constitution. By way of contrast, the right asserted in the present case is based on a generalized

right of privacy, and the evidence of the patient's alleged treatment is weak and unreliable.

Petitioners rely upon two conversations Nancy Cruzan had with her older sister, Christy White, one conversation she had with her friend and former roommate, Athena Comer, and her general lifestyle. The conversations concerned her younger sister's delivery of a stillborn, deformed baby, the death of her grandmother and the death of her friend's sister during pregnancy. Tr. at 387-96, 399, 536-41. Essentially, Nancy said that she would not want to live like a "vegetable" because she could not be normal and do things for herself; she would not want to live if she could not enjoy her life to the fullest.[38]

This evidence is inadequate to support the relief requested, Nancy's death by starvation, and would, if accepted, place at risk thousands of vulnerable persons who are no longer able to direct the course of their medical treatment and care. "A decision to refuse treatment, when that treatment will bring about death, should be as informed as a decision to accept treatment." *Cruzan* at 424. *See also In re Gardner*, 534 A.2d 947, 957 (Me. 1987) (Clifford, J., dissenting). The evidence offered by petitioners falls far short of establishing an informed refusal of life-sustaining food and water. "Informally expressed reactions to other people's medical condition and treatment do not constitute clear proof of a patient's intent." *In re Jobes*, 108 N.J. 394, 529 A.2d 434, 443 (1987). Evidence similar to that presented here has been found inadequate to establish an informed refusal of treatment. *See In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976); *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985).

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[38] Petitioners testified that Nancy would never want to be kept alive in her present condition. Tr. at 437-39, 441, 520. Nancy, however, never discussed the withdrawal of medical care or of nutrition and hydration with her family or friends. Tr. at 401-02, 451, 527, 541-42, 550-51. Nor did she ever express an opinion on euthanasia. Tr. at 401-02, 451, 527.

The New York Court of Appeals has recently warned of the dangers of accepting a patient's general statements that she did not want her life prolonged by life support systems as evidence of an intent to decline nourishment:

> If such statements were routinely held to be clear and convincing proof of a general intent to decline all medical treatment once incompetency sets in, few nursing home patients would ever receive life sustaining medical treatment in the future. The aged and infirm would be placed at grave risk if the law uniformly but unrealistically treated the expression of such sentiments as a calm and deliberate resolve to decline all life-sustaining medical assistance once the speaker is silenced by mental disability.

In re Westchester County Medical Center, 72 N.Y.2d 517, 532, 531 N.E.2d 607, 614 (1988).

The same compelling interests which have long justified the prohibition of homicide, suicide and euthanasia justify Missouri's regulation of the withdrawal of assisted feeding from incompetent patients who are neither terminally ill nor imminently dying. Permitting a guardian to withdraw life-sustaining food and fluids from an incompetent ward under the constitutional right of privacy would constitute the *Roe v. Wade* of euthanasia in this country. It would call forth this Court's subsequent judgment to settle a myriad of issues which the states traditionally have regulated through the law of homicide, suicide and guardianship. This is a road down which this Court should not travel. *See Bowers*, 478 U.S. at 196.

The immediate issue would be to determine which patients are eligible for the withdrawal of food and fluids, with the potential application to all incompetent, disabled patients. Another pressing issue that would have to be faced is whether guardians may administer lethal injections to incompetent patients who are eligible for the withdrawal of food and fluids. The inevitable tension caused by the delay while the patient starves will create pressure for a more "humane" method. Cloaking the

varied emotions and impulses of family and friends within the constitutional right of privacy would strip the states of their traditional power to protect the defenseless. It would establish motive and method as the dominant considerations in determining whether the death of a ward was a mercy-killing (protected by constitutional law) or a homicide (punishable under the criminal law), and subvert the traditional obligation of guardians to act solely in the best interest of their wards. These concerns are the very reason why the common law has always protected the sanctity of human life. The profound implications of this case for the family in American society and our ability to care for vulnerable persons require of this Court not merely a deference to the wise judgment of the Missouri Supreme Court but also a ringing reaffirmation of the sanctity of human life and of the role of the law in its protection.

CONCLUSION

The judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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